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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
7

8 BILLY RAY RILEY,

9 Petitioner,

3:01-cv-0096-RCJ-VPC

10 vs.

ORDER

11 TIMOTHY FILSON, *et al.*,

12 Respondents.
13 _____/

14
15 In this capital habeas corpus action, on August 19, 2016, pursuant to the order of the Ninth
16 Circuit Court of Appeals published as *Riley v. McDaniel*, 786 F.3d 719 (2015), this court ordered
17 judgment entered in favor of the petitioner, Billy Ray Riley, and judgment was entered on that date.
18 *See* Order entered August 19, 2016 (ECF No. 238); Judgment (ECF No. 239).

19 On September 14, 2016, respondents filed a motion for relief from judgment pursuant to
20 Federal Rule of Civil Procedure 60(b) (ECF No. 240). Riley filed an opposition to that motion on
21 October 28, 2016 (ECF No. 246). Respondents filed a reply on December 5, 2016 (ECF No. 248).

22 Respondents argue in support of their motion that a series of unpublished orders of the
23 Nevada Supreme Court has undermined the interpretation of Nevada law that was the premise for
24 court of appeals' ruling.

25 The portion of the court of appeals' ruling that is the subject of respondents' motion concerns
26 the question of what the elements of first-degree murder were under Nevada law at the time of

1 Riley's trial and when his conviction became final -- that is, whether "deliberation" was a separate
 2 and discrete element of the crime of first-degree murder. With respect to that issue, the court of
 3 appeals held:

4 It is clear ... that at the time Riley was tried in 1990, and at the time his
 5 conviction became final in 1991, deliberation was a discrete element of first-degree
 6 murder in Nevada. In *Hern v. State*, 635 P.2d 278, 280 (Nev. 1981), decided a
 7 decade earlier, the Nevada Supreme Court explained that "[i]t is clear from the statute
 8 that all three elements, willfulness, deliberation, and premeditation, must be proven
 9 beyond a reasonable doubt before an accused can be convicted of first degree
 10 murder." [Footnote 8: The *Hern* rule was by no means novel. See, e.g., *State v.*
 11 *Hing*, 16 Nev. 307, 308 (1881) ("[W]illfulness, deliberation, and premeditation ... are
 12 essential constituents of the crime of murder of the first degree.")]. Then, a year after
 13 Riley's conviction became final, the Nevada Supreme Court changed its mind in
 14 *Powell v. State*, 838 P.2d 921 (Nev. 1992), *vacated on other grounds*, 551 U.S. 79
 (1994). In approving the use of the *Kazalyn* instruction, it held that "deliberate,
 premeditated and willful are a single phrase, meaning simply that the actor intended
 to commit the act and intended death to result." *Id.* at 927. It called the three
 elements "redundant[t]." *Id.* Less than a decade later, in *Byford v. State*, 994 P.2d
 700 (Nev. 2000), the Nevada Supreme Court again reversed course, abrogating
Powell. It concluded that *Powell* -- and the *Kazalyn* instruction it approved -- had
 "confuse[d] ... premeditation and deliberation." *Id.* at 713. The instruction, the court
 held, "blur[red] the distinction between first- and second-degree murder," and
 subsequent case law's "further reduction of premeditation and deliberation to simply
 'intent' unacceptably carri[e]d this blurring to a complete erasure." *Id.*

15 In *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007), we concluded that the use
 16 of the *Kazalyn* instruction violated the Due Process Clause of the United States
 17 Constitution. *Polk* held that the instruction "relieved the state of the burden of proof
 18 on whether the killing was deliberate as well as premeditated." *Id.* at 910 (applying
 19 *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979)). In *Polk*, the petitioner had been
 20 convicted after *Powell* but before *Byford*; we concluded that Nevada law during that
 21 time included deliberation as a distinct element because, we reasoned, *Byford* was not
 22 a change in Nevada law but rather a "reaffirm[ation]" that its first-degree murder
 23 statute contained three *mens rea* elements. *Id.* After *Polk* was decided, however, the
 24 Nevada Supreme Court clarified in *Nika v. State*, 198 P.3d 839, 849 (Nev. 2008), that
 "Byford announced a change in state law." On that basis we partially overruled *Polk*,
 holding in *Babb v. Lozowsky*, 719 F.3d 1019, 1028-30 (9th Cir. 2013), that the use of
 the *Kazalyn* instruction between *Powell* and *Byford* did not constitute a due process
 violation because during that time, first-degree murder in Nevada included only one
 (merged) *mens rea* element, which the instruction accurately described. *Babb* did
 nothing, however, to disturb *Polk*'s underlying analysis: *Polk* continues to dictate that
 the *Kazalyn* instruction violates due process if, at the time it was given, Nevada law
 required the state to prove deliberation as a discrete *mens rea* element.

25 As already noted, at the time of Riley's trial and at the time his conviction
 26 became final, Nevada's first-degree murder law did indeed contain three separate
mens rea elements. In *Byford* and *Nika*, the Nevada Supreme Court reiterated that
Powell, decided in 1992, after Riley's conviction became final, represented a
 departure from prior precedent holding that the state was required to prove

deliberation separately from premeditation. *Byford* explained that it was a “rather recent phenomenon” that deliberation was “neglect[ed] ... as an independent element,” and traced this trend to *Powell*, which overlooked earlier pronouncements [such as *Hern*] which recognized that ‘deliberate’ and ‘premeditated’ define distinct elements.” 994 P.2d at 713-14. *Nika* characterized *Byford* as abandon[ing] the line of cases *starting with Powell*.” 198 P.3d at 847 (emphasis added); *see also id.* at 849 (“*Byford* ‘abandoned’ that precedent -- *Powell* and its progeny.”).

Because Nevada law treated deliberation as a distinct element of first-degree murder at the time *Riley* was convicted and at the time his conviction became final, the use of the *Kazalyn* instruction at his trial constituted a due process violation under the United State Constitution. *Polk*, 503 F.3d at 910.

Riley, 786 F.3d at 723-24 (emphasis in original) (footnote 7 omitted; footnote 8 included).

Respondents argue that this analysis has been undermined by *Adams v. State*, Case No. 60606, 2016 WL 315171 (Nev. Jan. 22, 2016), *Canape v. State*, Case No. 62843, 2016 WL 2957130 (Nev. May 19, 2016), and *Leavitt v. State*, Case No. 69218, 2016 WL 5399785 (Nev. Sept. 16, 2016), three unpublished orders issued by the Nevada Supreme Court after the court of appeals’ ruling in this case.

In *Adams*, a murder case in which the trial was held, and the conviction became final, before the Nevada Supreme Court’s *Powell* decision, the Nevada Supreme Court rejected an argument by the habeas petitioner that he was actually innocent of first-degree murder because the trial court gave the *Kazalyn* instruction; the Nevada Supreme Court found that argument to be flawed because, even assuming that the *Kazalyn* instruction was improper, “that deficiency would not establish that he is actually innocent of first-degree murder, which requires a showing that he is *factually* innocent.” *Adams*, 2016 WL 315171 at *2 (emphasis in original). In a footnote, the court added:

We also do not agree with the underlying premise of his argument. *See Nika*, 124 Nev. at 1280-87, 198 P.3d at 845-48 (discussing history of Nevada law on the phrase “willful, deliberate, and premeditated,” including *Hern*, and explaining that prior to *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000), this court had not required separate definitions of the terms and had instead viewed them as together conveying a meaning that was sufficiently described by the definition of “premeditation” eventually approved in *Kazalyn* and *Powell v. State*, 108 Nev. 700, 838 P.2d 921 (1992)).

Id. at *2 n.3.

1 In *Canape*, a Nevada murder case in which the trial occurred before the *Powell* decision, but
 2 the conviction became final after the *Powell* decision, the Nevada Supreme Court rejected the
 3 petitioner's argument that his counsel was ineffective for failing to object to the *Kazalyn* instruction.
 4 The Nevada Supreme Court stated: "We disagree because the *Kazalyn* instruction was appropriately
 5 given at the time of Canape's trial." *Canape*, 2016 WL 2957130 at *2, citing *Nika v. State*, 124
 6 Nev. 1272, 1289, 198 P.3d 839, 851 (2008). In a footnote, the Nevada Supreme Court added:

7 The Ninth Circuit recently discussed this court's *Kazalyn* jurisprudence in
 8 *Riley v. McDaniel*, 786 F.3d 719, 724 (9th Cir. 2015). While we do not agree with
 9 *Riley*, see *Nika*, 124 Nev. at 1280-87, 198 P.3d at 845-48 (discussing the history of
 10 Nevada law on the phrase "willful, deliberate, and premeditated," including *Hern v.*
 11 *State*, 97 Nev. 529, 635 P.2d 280 (1981), and explaining that prior to *Byford v. State*,
 12 116 Nev. 215, 994 P.2d 700 (2000), this court had not required separate definitions of
 13 the terms and had instead viewed them as together conveying a meaning that was
 14 sufficiently described by the definition of "premeditation" eventually approved in
 15 *Kazalyn* and *Powell v. State*, 108 Nev. 700, 838 P.2d 921 (1992)), we note that, given
 16 the verdict and the aggravating circumstances found, the jury would have necessarily
 17 concluded that the murder was willful, deliberate, and premeditated, or was
 18 committed in the course of a felony.

19 *Id.* at *2 n. 5.

20 In *Leavitt*, a murder case in which the trial was held, and the petitioner's conviction became
 21 final, before *Powell*, the Nevada Supreme Court ruled that the petitioner did not show cause and
 22 prejudice with respect to the procedural default of his claims. The court's discussion included the
 23 following:

24 Leavitt contends that the district court erred by failing to consider his good
 25 cause argument regarding *Riley v. McDaniel*, 786 F.3d 719, 721 (9th Cir. 2015)
 26 (holding that it was error to give the instruction referenced in *Kazalyn v. State*, 108
 Nev. 67, 825 P.2d 578 (1992), in trials conducted before *Powell v. State*, 108 Nev.
 700, 838 P.2d 921 (1992), or after *Byford v. State*, 116 Nev. 215, 994 P.2d 700
 (2000)). Although Leavitt cited *Riley* in his petition, he did not discuss *Riley*'s
 holding or apply it to his case. Therefore, we conclude that the district court did not
 err by failing to consider *Riley* and by denying his petition. As a separate and
 independent ground for denying relief, we also conclude that the district court did not
 err by denying Leavitt's petition because we do not agree with *Riley* and therefore it
 would not provide good cause. See *Nika v. State*, 124 Nev. 1272, 1289, 198 P.3d
 839, 851 (2008) (discussing the history of Nevada law on the phrase "willful,
 deliberate, and premeditated," including *Hern v. State*, 97 Nev. 529, 635 P.2d 280
 (1981), and explaining that prior to *Byford* this court had not required separate
 definitions of the terms and had instead viewed them as together conveying a
 meaning that was sufficiently described by the definition of "premeditation")

1 eventually approved in *Kazalyn* and *Powell*). But even assuming that *Riley* would
 2 provide good cause, Leavitt did not establish prejudice because he did not
 3 demonstrate that the result of trial would have been different had a different
 4 instruction been given.

5 *Leavitt*, 2016 WL 5399785 at *1.

6 Federal Rule of Civil Procedure 60(b)(6) allows the court to relieve a party from an order for
 7 any reason not specified in Rule 60(b) that justifies relief. *Lyon v. Agusta S.P.A.*, 252 F.3d 1078,
 8 1088-89 (9th Cir. 2001). Rule 60(b)(6) is to be “used sparingly as an equitable remedy to prevent
 9 manifest injustice and is to be utilized only where extraordinary circumstances prevented a party
 10 from taking timely action to prevent or correct an erroneous judgment.” *Latshaw v. Trainer*
 11 *Wortham & Co., Inc.*, 452 F.3d 1097, 1103 (9th Cir. 2006). A Rule 60(b)(6) motion “should not be
 12 granted, absent highly unusual circumstances, unless the ... court is presented with newly discovered
 13 evidence, committed clear error, or if there is an intervening change in the controlling law.” *Marlyn*
 14 *Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009). In *Phelps v.*
 15 *Alameida*, 569 F.3d 1120 (9th Cir. 2009), the court instructed “that the proper course when
 16 analyzing a Rule 60(b)(6) motion predicated on an intervening change in the law is to evaluate the
 17 circumstances surrounding the specific motion before the court.” *Phelps*, 569 F.3d at 1133. “[A]
 18 change in the law will not always provide the truly extraordinary circumstances necessary to reopen
 19 a case[,]” and “something more than a ‘mere’ change in the law is necessary.” *Id.* (citation omitted).
 20 When making this determination, courts should consider six factors: (1) the change in the law;
 21 (2) “the petitioner’s exercise of diligence in pursuing his claim for relief[;]” (3) whether reopening
 22 the case would upset “the parties’ reliance interest in the finality of the case[;]” (4) the extent of “the
 23 delay between the finality of the judgment and the motion for Rule 60(b)(6) relief [;]” (5) the
 24 relative “closeness of the relationship between the decision resulting in the original judgment and
 25 the subsequent decision that represents a change in the law[;]” and (6) concerns of comity. *Jones v.*
 26 *Ryan*, 733 F.3d 825, 839-40 (9th Cir. 2013) (citing *Phelps*, 569 F.3d at 1135-39). These “factors ...
 are designed to guide courts in determining whether such extraordinary circumstances have been
 demonstrated by an individual seeking relief under” Rule 60(b)(6). *Phelps*, 569 F.3d at 1135.

1 In this court's view, the three orders of the Nevada Supreme Court cited by respondents do
2 not constitute extraordinary circumstances mandating relief under Rule 60(b)(6).

3 Both respondents' motion and the subject language in *Adams*, *Canape*, and *Leavitt*,
4 inaccurately characterize the issue decided in *Riley*. The Nevada Supreme Court expresses
5 disagreement with *Riley*, characterizing the issue as whether, before *Powell*, Nevada law required, in
6 jury instructions regarding first-degree murder, separate definition of the terms "willful, deliberate,
7 and premeditated." Respondents do the same in their motion for relief from the judgment. That,
8 however, was not the issue ruled upon in *Riley*. The question in *Riley* was whether deliberation was
9 a separate and discrete element of the crime of first-degree murder. Therefore, in *Adams*, *Canape*,
10 and *Leavitt*, the Nevada Supreme Court did not state its disagreement with the actual ruling in *Riley*.

11 Furthermore, the portions of *Adams*, *Canape*, and *Leavitt* cited by the respondents are
12 arguably dicta, as there were other bases for the Nevada Supreme Court's rulings in those cases.

13 And finally, and perhaps most importantly in this court's view, the orders in *Adams*, *Canape*,
14 and *Leavitt* are unpublished. The rule regarding the precedential value of unpublished orders of the
15 Nevada Supreme Court is the following:

16 (c) Form of Decision. The court decides cases by either published or unpublished
17 disposition.

18 (1) A published disposition is an opinion designated for publication in the Nevada
19 Reports. The court will decide a case by published opinion if it:

20 (A) Presents an issue of first impression;

21 (B) Alters, modifies, or significantly clarifies a rule of law previously
22 announced by the court; or

23 (C) Involves an issue of public importance that has application
24 beyond the parties.

25 (2) An unpublished disposition, while publicly available, does not establish
26 mandatory precedent except in a subsequent stage of a case in which the unpublished
disposition was entered, in a related case, or in any case for purposes of issue or
claim preclusion or to establish law of the case.

(3) A party may cite for its persuasive value, if any, an unpublished disposition
issued by this court on or after January 1, 2016. When citing an unpublished
disposition to this court, the party must cite an electronic database, if available, and

1 the docket number and filing date in this court (with the notation “unpublished
2 disposition”). A party citing an unpublished disposition must serve a copy of it on
3 any party not represented by counsel.

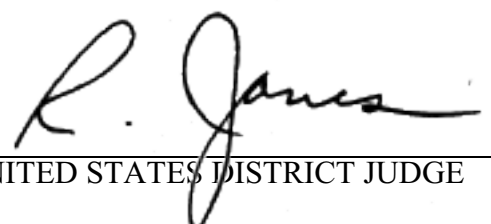
4 Nev. R. App. P. 36(c). In this case, in the portion of its decision quoted above, the court of appeals
5 relied on published opinions of the Nevada Supreme Court, including *Nika v. State*, 198 P.3d 839
6 (Nev. 2008), *Byford v. State*, 994 P.2d 700 (Nev. 2000), *Hern v. State*, 635 P.2d 278 (Nev. 1981),
7 and *State v. Hing*, 16 Nev. 307 (1881). To the extent that the unpublished orders in *Adams*, *Canape*,
8 and *Leavitt* conflict with language in those published Nevada Supreme Court opinions, they do not
9 invalidate that language; under Nevada Rule of Appellate Procedure 36(c), unpublished orders of the
10 Nevada Supreme Court, while they might be persuasive under some circumstances, are not
11 mandatory precedent. *See* Nev. R. App. P. 36(c). This court will not grant relief under Rule
12 60(b)(6), and upset the judgment in this case, based upon these three unpublished Nevada Supreme
13 Court orders. The unpublished orders in *Adams*, *Canape*, and *Leavitt* are not mandatory precedent,
14 and are not so persuasive as to mandate a grant of relief from the judgment in this case.

15 In short, *Adams*, *Canape*, and *Leavitt* do not, in this court’s view, constitute extraordinary
16 circumstances requiring the judgment in this case to be vacated. None of the factors identified in
17 *Phelps* regarding the application of Rule 60(b)(6) weigh significantly in favor of respondents’
18 motion. The motion will be denied.

19 The court does not reach the arguments made by Riley that a grant of relief from the
20 judgment in this case, in view of *Adams*, *Canape*, and *Leavitt*, would violate his federal
21 constitutional rights. *See* Response to Motion for Rule 60(b) Relief from Judgment (ECF No. 246).

22 **IT IS THEREFORE ORDERED** that respondents’ Motion for Rule 60(B) Relief from
23 Judgment (ECF No. 240) is **DENIED**.

24 Dated: This 16th day of February, 2017.

25 
26 UNITED STATES DISTRICT JUDGE